# Re Sama Corporation Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D4–42–504–88
ZAKARIA YATIM J
13 SEPTEMBER 1991

***Companies and Corporations*** *— Receivership — Power of receiver and manager to sell property — Company created debenture over its assets and a charge over its land — Charge created under National Land Code 1965 — Receiver and manager appointed by debenture holder — Whether receiver and manager could invoke the debenture to obtain order for sale of the land*

***Land Law*** *— Charge — Nature of fixed charge — Nature of floating charge — Distinction between fixed and floating charge*

***Land Law*** *— Power of court to order sale of land — Land held under land office title — Court had no power to order sale of such land — National Land Code 1965 ss 260 & 261(1)*

Sama Corporation Sdn Bhd ('the company') was a customer of Mercantile Bank Ltd ('the said bank'). In consideration of the said bank granting credit facilities to the company, the company created and executed a debenture ('the debenture') on 1 November 1973 in favour of the said bank. The company also created a charge ('the charge') over its land ('the said land') on the same day under the National Land Code 1965. Both the debenture and charge were duly registered with the Registrar of Companies on 8 November 1973. The debenture and charge were subsequently transferred by the said bank to another bank ('HSBC'). The company was later wound up by an order of the court dated 9 December 1988. On 22 November 1989, HSBC appointed A a receiver and manager of the charged assets pursuant to the debenture. On 30 May 1990, A filed an application by way of summons-in-chambers and obtained an order dated 9 July 1990 ('the said order'), inter alia, that he be at liberty to sell the assets comprised in the debenture including but not limited to the said land. A exhibited several valuation reports in his application, one of which stated that the fair market value of the said land was $1.875m, the price at which it was sold.

Five applications were filed by various creditors of the company and a former director of the company, inter alia, to set aside the said order and that sales pertaining to the said land be stayed pending the outcome of their applications. The issues to be decided were whether the receiver and manager, A, had the power to sell the said land and, if so, whether the said land was sold at a price based on the true market value.

**Held**, allowing the applications:

(1) A fixed charge immediately attaches and binds the property, the subject of the charge, at the time of the creation of the charge. A floating charge, however, does not immediately attach to or bind any definite property at the time of the creation of the charge. The company can deal with the property, which is the subject of a floating charge, until the creditor intervenes or some pre-defined event occurs to convert the floating charge into a fixed charge. There are thus two characteristic features of a floating charge not found in a fixed charge. Firstly, the property, the subject of a floating charge, is not permanent and can change constantly from time to time; and secondly, a floating charge does not immediately, without the occurrence of the specified event, fasten to any existing property. A floating security was not covered by a fixed charge.

(2) In the present case, cl 2 of the debenture provided for a floating charge in respect of the said land. The said land was also charged under the National Land Code 1965 and the charge was immediately fixed the moment it was registered. Therefore, the receiver and manager had no capacity or power to invoke the debenture in respect of the charged land.

(3) The said land was held under a land office title, that is EMR land and the court had no power to order the sale of Mukim land. Since the charge is under the National Land Code 1965, the only remedy open to the chargee was under the provisions of the Code. The chargee and not the receiver and manager should apply for an order for sale of the land in accordance with the provisions of the National Land Code 1965.

(4) Even if the court was wrong in concluding that the receiver and manager had no capacity or power to apply for an order for sale of the said land, the court found that there was no proper valuation of the said land before the court and that the receiver and manager had failed to obtain the true market value of the said land when he applied for the said order.

**Per curiam**:

(1) A valuation made without showing how the value was arrived at was not proper and could be misleading.

(2) If the receiver and manager took reasonable care to obtain the true market value at the time of the sale of the said land, he was under no obligation to sell the property at the highest price.

**[Bahasa Malaysia summary**

Sama Corporation Sdn Bhd ('syarikat itu') adalah pelanggan Mercantile Bank Ltd ('bank itu'). Sebagai balasan pemberian kemudahan kredit oleh bank itu kepada syarikat itu, syarikat itu telah mewujudkan dan menyempurnakan satu debentur ('debentur itu') pada 1 Novem-

ber 1973 memihak kepada bank itu. Syarikat itu telah juga mewujudkan satu gadaian ('gadaian itu') atas tanahnya ('tanah itu') pada hari yang sama di bawah Kanun Tanah Negara 1965. Kedua-dua debentur dan gadaian itu telah didaftarkan dengan cara yang berpatutan dengan Pendaftar Syarikat pada 8 November 1973. Debentur dan gadaian itu telah kemudiannya dipindah hak oleh bank itu kepada bank yang lain ('HSBC'). Kemudiannya syarikat itu telah digulung oleh perintah mahkamah bertarikh 9 Disember 1988. Pada 22 November 1989, HSBC telah melantik A sebagai penerima dan pengurus aset yang digadai mengikut debentur itu. Pada 30 Mei 1990, A telah memfailkan suatu permohonan melalui saman dalam kamar dan telah memperoleh suatu perintah bertarikh 9 Julai 1990 ('perintah itu'), antara lain, bahawa beliau diberi kebebasan menjual aset yang terkandung di dalam debentur itu, termasuk tetapi tidak terhad kepada tanah itu. A telah menunjukkan beberapa laporan penilaian dalam permohonannya, yang mana satu daripadanya menyatakan bahawa nilai pasaran yang berpatutan bagi tanah itu adalah $1.875 juta, harga pada mana ia telah dijual.

Lima permohonan telah difailkan oleh beberapa pemiutang syarikat itu dan seorang bekas pengarah syarikat itu, antara lain, untuk mengetepikan perintah itu dan bahawa penjualan berhubungan dengan tanah itu digantungkan sementara menantikan keputusan permohonan mereka. Isu yang timbul untuk diputuskan ialah sama ada penerima dan pengurus syarikat itu, A, berkuasa menjual tanah itu dan, jika ia, sama ada tanah itu telah dijual dengan harga berdasarkan nilai pasaran yang sebenarnya.

**Diputuskan,** membenarkan permohonan itu:

(1) Suatu gadaian tetap dengan serta-merta mengikat harta itu, perkara gadaian itu, pada masa pewujudan gadaian itu. Suatu gadaian terapung, namun demikian, tidak dengan serta-merta mengikat sebarang harta yang tentu pada masa pewujudan gadaian itu. Syarikat itu boleh membuat urusan berkenaan harta itu, yang menjadi perkara gadaian terapung itu, sehingga pemiutang bercampur tangan atau sesuatu kejadian yang ditentukan terlebih dahulu berlaku untuk menukar gadaian terapung itu kepada suatu gadaian tetap. Oleh demikian ada dua sifat penting gadaian terapung yang tidak terdapat dalam gadaian tetap. Pertamanya, harta itu, yang menjadi perkara gadaian terapung itu, tidak kekal dan boleh sentiasa berubah dari masa ke semasa; dan keduanya, suatu gadaian terapung tidak dengan serta-merta, tanpa berlakunya kejadian yang ditetapkan, mengikat sebarang harta yang ada. Suatu gadaian tetap tidak meliputi suatu gadaian terapung.

(2) Di dalam kes ini, fasal 2 debentur itu memperuntukkan suatu gadaian terapung berkenaan dengan tanah itu. Tanah itu juga telah digadaikan di bawah Kanun Tanah Negara 1965 dan gadaian itu telah dengan serta-merta menjadi tetap sebaik sahaja ianya didaftarkan. Oleh kerana itu, penerima dan pengurus itu tidak

berkedudukan atau berkuasa untuk menggunakan debentur itu berkenaan dengan tanah yang digadai itu. A

(3) Tanah itu dipegang di bawah 'land office title', iaitu tanah EMR dan mahkamah tidak berkuasa memerintah penjualan tanah Mukim. Kerana gadaian itu adalah di bawah Kanun Tanah Negara 1965, remedi tunggal yang terbuka kepada pemegang gadaian ialah di bawah peruntukan Kanun itu. Pemegang gadaian dan bukan penerima dan pengurus itulah yang sepatutnya memohon untuk perintah penjualan tanah itu mengikut peruntukan Kanun Tanah Negara 1965. B

(4) Sekalipun mahkamah salah dalam membuat kesimpulan bahawa penerima dan pengurus itu tidak berkedudukan atau berkuasa memohon perintah penjualan tanah itu, mahkamah mendapati bahawa tidak terdapat penilaian wajar tanah itu di hadapan mahkamah dan bahawa penerima dan pengurus itu telah gagal memperoleh nilai pasaran yang sebenar bagi tanah itu apabila beliau memohon perintah itu. C

D

**Per curiam**:

(1) Suatu penilaian yang dibuat tanpa menunjukkan bagaimana nilai itu telah dicapai tidak wajar dan boleh mengakibatkan kekeliruan.

(2) Jika penerima dan pengurus itu mengambil perhatian yang munasabah untuk memperoleh nilai pasaran yang sebenar pada masa penjualan tanah itu, beliau tidak berkewajipan menjual harta itu pada harga yang tertinggi.] E

**Cases referred to**

1 *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 (folld)

2 *United Malayan Banking Corporation Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor* [1986] 1 MLJ 75 (distd) F

3 *Tan Teng Pan v Wong Fook Shang* [1973] 1 MLJ 31 (folld)

4 *Eu Finance Bhd lwn Sim Sen Organization Bhd* [1990] 2 MLJ 357 (folld) G

5 *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 (folld)

6 *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] Ch 949 (folld)

*VJ Kumar* (*Jaspal Singh* with him) (*Kumar Jaspal & Quah*) for the receiver and manager. H

*RR Sethu* (*Khoo Phaik See* with him) (*Khoo Naidu & Deol*) for the former director of Sama Holdings Bhd.

*K Balagum* (*AK Lee & Co*) for the creditors.

*WSW Davidson* (*Azman Davidson & Co*) for the interveners. I

*O Thaiyub Khan* (Jabatan Pemegang Harta) for the Official Liquidator.

*Cur Adv Vult*

**Zakaria Yatim J**: There are five similar applications before this court. The first application was filed by Teras Tenaga Industries Sdn Bhd, a creditor of Sama Corporation Sdn Bhd (hereinafter referred to as 'the company'). The second application was filed by Mr Lim Tuck Fatt, the former director of the company (in liquidation). The third application was filed by Concrete Industries (Johore) Sdn Bhd, Morier (Malaysia) Sdn Bhd, and Tas-Redland Tiles Sdn Bhd, who are also creditors of the company. The fourth application was filed by Sama Wira Mulpha Industries Sdn Bhd, another creditor of the company. The fifth application was filed by Sama Corporation (KB) Sdn Bhd also a creditor of the company.

In all these five applications, the applicants are seeking the order of the court (a) to set aside an order made by this court on 9 July 1990; (b) that sales pertaining to the land held under EMR 3843, Lot 513, Mukim of Petaling (hereinafter referred to as 'the said land') be stayed pending the outcome of their applications; (c) that notice be given to the other creditors of the company of their applications; and (d) that the costs of the applications be costs in the cause.

The order dated 9 July 1990, which the applicants seek to set aside, is as follows:

> Upon the application of the applicant and upon reading the summons-in-chambers dated 30 May 1990 and the affidavit of En Abdul Samad bin Hj Alias affirmed 29 May 1990 and the affidavit of Mr Jaspal Singh affirmed on 9 July 1990 filed herein and upon hearing Mr Jaspal Singh of counsel for the applicant and En Mohd Noor Alias for the official receiver abovenamed it is ordered that:
>
> (i) the receiver and manager is at liberty to sell assets comprised in the debenture including but not limited to:
>
> (a) land held under EMR 3843 Lot 513, Mukim of Petaling;
> (b) shares held in CI Holdings Sdn Bhd and Sama Corporation Development Sdn Bhd;
>
> (ii) the senior assistant registrar of this honourable court do execute in the name of Sama Corporation Sdn Bhd such deeds and/or forms as are necessary to effect the discharge and transfer of the said assets upon application by the receiver and manager;
> (iii) the Registrar of Land Titles do and cause to be registered such instruments presented by the receiver and manager for the discharge of charge and transfer of title in respect of EMR 3843 Lot 513, Mukim of Petaling, Wilayah Persekutuan.
> (iv) the official receiver/liquidator do deliver assets in or coming into his possession comprised in the charge given in the said debenture dated 1 November 1973 to the receiver and manager of Sama Corporation Sdn Bhd;
> (v) the costs of this application be provided for.
>
> Dated 9 July 1990.

Before the hearing of the applications, the court heard another application by Messrs Wang Zheng Corporation Sdn Bhd, who applied to be added as

an intervener in the matter. I allowed the application and Messrs Wang Zheng Corporation Sdn Bhd was added as intervener in the applications.

The facts of the case are briefly as follows: The company was a customer of Mercantile Bank Ltd ('Mercantile Bank'). In consideration of Mercantile Bank granting credit facilities to the company, the company created and executed a debenture ('the said debenture') on 1 November 1973 in favour of Mercantile Bank. The company also created a charge ('the said charge') dated 1 November 1973 under the National Land Code 1965 in respect of land held under title EMR, Lot 513, Mukim of Petaling. Both the debenture and the charge were duly registered with the Registrar of Companies on 8 November 1973. The debenture and the charge were subsequently transferred by Mercantile Bank to the Hongkong & Shanghai Banking Corporation ('HKSBC') for a consideration of $1m. The company was subsequently wound up by the order of the court dated 9 December 1988 on the ground that the company was unable to pay its debts. By a deed of appointment dated 22 November 1989, HKSBC, pursuant to the said debenture, appointed Encik Abdul Samad bin Hj Alias of Messrs Arthur Andersen & Co a receiver and manager of the charged assets and he was to exercise all the powers of a receiver and manager given by the said debenture. On 30 May 1990 the receiver and manager filed an application by summons-in-chambers and on 9 July 1990, he obtained the order reproduced above, which the applicants are now asking the court to set aside. On 2 August 1990, the intervener, Messrs Wang Zheng Corporation Sdn Bhd entered into a sale and purchase agreement with the receiver and manager whereby the latter agreed to sell the said land to the invervener for an agreed price of $1,687,500.

Mr RR Sethu, counsel for the applicant, Mr Lim Tuck Fatt, the former director of the company, submitted that the receiver and manager had no capacity or power under the debenture to sell the said land. He said that the charge in respect of the land was a floating charge. It was not a fixed and floating charge. He added that there was already a separate charge under the National Land Code 1965. He contended that a floating charge did not cover a charge under the National Land Code 1965. According to him, a charge under the National Land Code 1965 was immediately fixed the moment it was charged. He further contended that a charge under the National Land Code 1965 was not a floating charge.

The first question for the court to consider is whether the receiver and manager has the power to sell the land. Clause 2 of the debenture provides for a floating charge in respect of the said land. The clause states:

> As security for the repayment on demand of the balance which on the current or other account or accounts of the company with the bank shall for the time being be owing as aforesaid, the company as beneficial owner hereby charges to the bank by way of *a floating charge* all its undertaking and other property and assets whatsoever and wheresoever both present and future including but not restricted to plant, equipment and machinery, stock-in-trade (including raw materials, work-in-progress and finished products), uncalled capital for the time being and book debts owing to the company at any time and from time to time. (Emphasis added.)

The Court of Appeal in England in *Evans v Rival Granite Quarries Ltd*[1] has discussed what is a floating charge. In his judgment at pp 993, 994 and 997, Fletcher Moulton LJ said:

> In the former case Lord Macnaghten says (3): 'A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.' I call attention to the fact that Lord Macnaghten there lays down that that which changes the character of a floating security to that of a fixed charge is either the cessation of the carrying on of business by the company or the actual intervention of the debenture holder, but not his mere right to intervene. Mere default on the part of the company does not change the character of the security; the debenture holder must actually intervene. This description of a floating charge, coming as it does from such a high authority, has been in general use in the courts. ... '... I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.' I think that Lord Macnaghten was here keeping in view the two characteristic features of floating charges — (1) the non-permanence of the property which is the subject of the charge, and its constant change from time to time, and (2) that a floating charge does not of itself fasten and settle even on the property existing at the moment. This explanation removes all difficulties arising from decisions which speak of a floating charge as an existing charge. It is an existing charge, and is rightly termed so, but care must be taken to remember that it has not settled down and fastened on the property which is the subject of the charge. I find no difficulty in grasping such a concept. ... I now turn to the second and more modest line of argument, which is that, assuming that the debenture holder in order to get priority must have turned his charge from a floating charge into a specific charge on the company's assets, he has done so in this case, because he gave a notice to the bank not to pay the judgment creditor and claimed the balance lying at the bank. In my opinion that argument is fallacious. A security of this kind must be either floating or fixed. While it is a floating security the company has a right, not a mere licence, to carry on its business until the debenture holder intervenes, and when the debenture holder does intervene he must do so with the intention of making his security a fixed security. In my opinion it is a breach of contract on the part of the debenture holder to interfere in the conduct of the business so long as his security is only a floating security.

Buckley LJ in the same case said at p 999:

> The outcome of the decisions may be thus summarized. A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific

> security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

From the passages quoted above, it is clear that a fixed charge immediately attaches and binds the property, the subject of the charge, at the time of the creation of the charge. A floating charge, however, does not immediately attach to or bind any definite property at the time of the creation of the charge. The company can deal with the property, which is the subject of a floating charge, until the creditor intervenes or some pre-defined event occurs to convert the floating charge into a fixed charge.

There are thus two characteristic features of a floating charge not found in a fixed charge. Firstly, the property, the subject of a floating charge, is not permanent and can change constantly from time to time; and secondly, a floating charge does not immediately, without the occurrence of the specified event, fasten to any existing property.

I agree with Mr Sethu that a floating security is not covered by a fixed charge. In the present case, the receiver and manager has no capacity or power to invoke the debenture where the charge is a fixed charge. According to JR Lingard, in his book *Bank Security Documents* (2nd Ed) p 123,

> ... Because the floating charge is 'incomplete' and 'dormant' until it crystallizes, subsequent fixed charges (whether legal or equitable) in the ordinary course of business even with notice of the floating charge will take priority over it, subject to para 9.7 below (*Re Hamilton's Windsor Ironworks, ex p Pitman and Edward*).
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> The rule was explained by North J in these words in *Wheatley v Silkstone and Haigh Moor Coal Co.*
>
> 'In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent and has not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and, inasmuch as I find that in the ordinary course of business and for the purpose of the business this mortgage was made, it is a good mortgage upon and a good charge upon the property comprised in it, and is not subject to the claim created by the debentures.'

Mr Davidson, counsel for the intervener, submitted that although the debenture provided for a floating charge it became a fixed charge when the receiver and manager was appointed. He referred to 7(2) *Halsbury's Laws of England* (4th Ed) at para 1101 where it is stated:

> If the company ... is wound up, or if a receiver is appointed or some event happens upon which the charge is to become a fixed charge, the security ceases

A to be a floating security and becomes a fixed charge and the company cannot thereafter deal with any part of the property so charged except subject to the charge.

Mr Davidson next referred to the case of *United Malayan Banking Corporation Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In* B *Liquidation) & Anor.*[2] He referred to the judgment of the learned judge at p 82, where the learned judge said:

> Nevertheless, albeit with some diffidence, I hold that a debenture is an altogether different class of document from a charge under the [National Land Code 1965]. The floating charge is in fact over unspecified property. When it crystallizes it
> C attaches itself to the company's land as much as it does to its chattels and personalty. If the document is to be commercially effective the debenture holder should be permitted to move with due expedition. It has not been suggested to me by Mr Ong that once the floating charge crystallizes, that part of it which attaches itself to land must be regarded as a fixed charge of land thereby requiring registration under the Code. Indeed it is difficult to envisage how that could be done. But what is being suggested is that in so far as sale is concerned
> D the debenture is on a par with a charge under the Code.
>
> With respect, I am unable to follow. The power to sell under the debenture arises by virtue of the contractual provisions of the debenture itself. In this case cl 10 of the debenture is relevant. So is s 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienating land.

E

I do not disagree with the passage quoted above. But in that case, under the debenture there was a fixed and floating charge.

In the present case, the land in question was charged under the National Land Code 1965 and the charge was immediately fixed the moment it was registered. The charge is not a floating charge. Therefore the receiver and
F manager had no power to act under the debenture in respect of the charged land.

According to the charge document, in the present case, the chargee is HKSBC. Since the charge is under the National Land Code 1965, the only remedy open to the chargee is under the provisions of the National Land
G Code 1965. The land in question is held under a land office title, that is EMR land. This court has no power to order the sale of Mukim land. In *Tan Teng Pan v Wong Fook Shang*,[3] the chargee sought for an order for sale of land held under EMR in the Mukim of Klang for the recovery of the sum of $6,000 due by the chargor to the chargee under a charge which was duly registered by the Collector of Land Revenue, Klang. The question
H before the court was whether the court had jurisdiction to entertain the application when the land in question was land held under a land office title. The court decided that in view of the provisions of ss 260 and 261(1) of the National Land Code 1965, the court had no jurisdiction to entertain the application.

I In the present case it is the chargee, and not the receiver and manager, who should apply for an order for sale of the land in accordance with the provisions of the National Land Code 1965.

If I am wrong in concluding that the receiver and manager has no capacity or power to apply for an order for sale of the land, the next question to consider is whether the receiver and manager was selling the land at a price based on the true market value? A

When the receiver and manager filed the application, he exhibited the following valuation reports. One was a letter written by Messrs Henry Butcher to Messrs Arther Anderson & Co dated 2 April 1990. That letter stated that the forced sale value of the land was $1.87m. It was on the basis of that letter that the receiver and manager found a buyer for the land for $1.875m. Another was a valuation report purported to be prepared by Messrs Henry Butcher. In that report it was stated that the 'Fair market value of the freehold unencumbered interest in the subject property with the benefit of vacant possession is $1,875,000...'. In this report the valuers purported to have adopted the comparison method but the report did not show any evidence of values of comparative properties. The report was not even signed by Messrs Henry Butcher. B C

I agree with Mr Sethu that Messrs Henry Butcher's valuation was defective. The report did not disclose the comparable basis for the valuation. In *Eu Finance Bhd lwn Sim Sen Organization Bhd*,[4] the court decided that a valuation made without showing how the value was arrived at was not proper and could be misleading. I respectfully agree with that decision. D

Another valuation was prepared by the government. The government valuation report stated that the open market value of the land was $3.3m. This was not acceptable to the receiver and manager as the valuation did not give any basis as to how the open market value was arrived at. E

The other valuation was done by Messrs Raine and Home Zaki & Partners. In their report dated 6 July 1990 the open market value of the property without vacant possession was $1.92m, and with vacant possession was $2.3m. The forced sale value was $1.92m. Mr Lim Tuck Fatt in his affidavit affirmed on 25 October 1990 averred that there was a very significant discrepancy in the report. In para 22 of the affidavit, he said: F

(a) In reply to paras 19 and 20 of the affidavit in reply I wish to to refer to the said valuation report by Messrs Zaki & Partners dated 9 July 1990 ('JS-1'). G
(b) On p 15, the report states that land along 19th km Jalan Puchong is being transacted between $100 to $140 per sq m, ie $9.29 to $13.01 per sq ft.
(c) The property in question is located at 11.2km Jalan Puchong, and hence being much closer to the city should fetch a higher value. H
(d) In fact the report on p 15 goes on to say that a comparable property having an area of 2,415.53 sq m was sold for $900,000 on 1 November 1988. This equates to $372.58 per sq m or $34.62 per sq ft.
(e) Messrs Zaki & Partners then goes on to place a fair market value of $2.3m on the said land which equates to only $141.55 per sq m or $13 per sq ft. I

(f) This value is significantly lower than the sale value obtained on the comparable property which was sold in 1988 when property values were still depressed.

(g) This reveals a very significant discrepancy in the report.

The above averment has not been disputed.

There were two other valuation reports which were not brought to the attention of the court when the receiver and manager made his application. Both these valuation reports were prepared by WM Malik & Lee. The first valuation by Malik & Lee was dated 11 April 1988. According to that report the forced sale value of the said land was $6m. The second report by Malik & Lee, dated 13 August 1986 was to update the value of the said property. In the second report the forced sale value of the said land was $4m. After the order dated 9 July 1990 was made, Malik & Lee made a further valuation on the said property. In their valuation report dated 14 September 1990, the forced sale value of the said land was $4.2m.

Having seen all the valuation reports, I am now of the view that when the order was made on 9 July 1990, there was no proper valuation of the property before the court. From the various valuation reports I have just referred to, it is clear that the receiver and manager had failed to obtain the true market value of the said property when he made the application. In *American Express International Banking Corp v Hurley*,[5] it was held that a receiver was under a duty to a guarantor of the mortgagor's debt to take reasonable care to obtain the *true market value* of the mortgaged property when he realized the property in the exercise of the power of sale. In *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd*,[6] Salmon LJ, in his judgment at p 966, said:

> There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: ... The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care *to obtain what I call the true market value at the date of the sale.* (Emphasis added.)

It is true that if the receiver and manager took reasonable care to obtain the true market value at the time of the sale of the said property, he was under no legal obligation to sell the property at the highest price. See the *Cuckmere* case[6] at p 965. Mr V Kumar, counsel for the receiver and manager rightly

said that the obligation of the receiver and manager was to obtain only the market value at the time of sale. According to him, at the time of sale, the receiver and manager had a valuation by Messrs Henry Butcher. With respect, as I pointed out earlier, Messrs Henry Butcher's valuation report was defective and could not be relied upon. Mr Kumar also referred to the valuation report prepared by Messrs Raine & Horne Zaki & Partners. This report, too cannot be relied upon because there was a very significant discrepancy in it.

In the circumstances there is no evidence to show that the price of $1,875,000 was the true market value of the said land when the receiver and manager applied for the order dated 9 July 1990.

For the reasons stated above I allow all the five applications with costs and set aside the order dated 9 July 1990.

*Applications allowed.*

Reported by Neoh Lay Choo